



April 25, 2002

Ms. Janie L. Johnson  
Assistant Criminal District Attorney  
Gregg County  
101 East Methvin Street, Suite 333  
Longview, Texas 75601

OR2002-2133

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161898.

The Gregg County Criminal District Attorney (the "district attorney") received a request for "all files, records, and any other documents in the possession of the [district attorney]'s Office" pertaining to a named individual in Cause Nos. 21932-B, 21934-B, and 21936-B. Although you state that you have released some of the responsive information, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Some of the records at issue are medical records, access to which is governed by the MPA, chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records subject to the MPA.

Next, we note that some of the information that we have marked is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

...

(17) information that is also contained in a public court record.

Gov't Code § 552.022(a)(12),(17). The marked orders and court records must be released under section 552.022, unless they are confidential under other law. Although you claim that these documents are excepted from disclosure pursuant to sections 552.103, 552.108, and 552.111 of the Government Code, these exceptions are discretionary exceptions to disclosure under the Public Information Act that do not constitute "other law" for purposes

of section 552.022.<sup>2</sup> Accordingly, the district attorney may not withhold these records from disclosure pursuant to sections 552.103, 552.108, or 552.111 of the Government Code.

However, you also claim that these records are confidential under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked the information that the district attorney must withhold under common-law privacy as encompassed by section 552.101 of the Government Code. *See id.* The district attorney must release the remaining marked orders and court records to the requestor in their entirety.

The submitted information contains fingerprints. Fingerprints are considered "biometric identifiers," and as such are made confidential per se under sections 559.001, 559.002, and 559.003 to the Government Code. Sections 559.001, 559.002, and 559.003 of the Government Code provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 586 (1991) (governmental body may waive section 552.108) 522 at 4 (1989) (discretionary exceptions in general).

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

The submitted documents include fingerprint information that is governed by these statutes. It does not appear to this office that section 559.002 permits the disclosure of this information to the requestor. Therefore, the district attorney must withhold the fingerprint information that we have marked under section 559.003 of the Government Code.

The submitted information also contains an accident report. Section 550.065 of the Transportation Code governs the release of Texas peace officer's accident reports completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, the Texas Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* Because the requestor has not provided the required information, the district attorney must withhold the accident report under section 552.101 in conjunction with section 550.065 of the Transportation Code.

You claim that the remaining information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the requested information relates to three interrelated capital murder cases. You state that two of the cases, Cause Nos. 21,934-B and 21,936-B, are still pending prosecution in the 124<sup>th</sup> District Court of Gregg County, Texas. You inform us that the third case, Cause No. 21,932-B, has resulted in a conviction. Because the cases arise from the same criminal episode, you assert that the prosecution of each of the three cases relies upon the same evidence and information, and that the release of the information from the third case would interfere with the pending prosecution of the first two cases. The requestor disputes the classification of these cases as pending because of the time that has elapsed since the indictments were returned by the grand jury. Since questions of fact are not resolvable in the open records process, we therefore rely on the representations of the governmental body. Open Records Decision Nos. 554 (1990); 552 (1990). Based upon your representations, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Thus, with the exception of basic information, which you indicate has already been released, section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure. You may, however, choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov't Code § 552.007. As section 552.108 is dispositive, we do not address your remaining arguments.<sup>3</sup>

In summary, medical records may be released only as provided under the MPA. With the exception of the marked information that the district attorney must withhold under common-law privacy as encompassed by section 552.101, the marked orders and court records subject to section 552.022(a) must be released to the requestor in their entirety. The district attorney must withhold the fingerprint information that we have marked under section 559.003 of the Government Code. Because the requestor has not provided the required information, the district attorney must withhold the accident report under

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<sup>3</sup>Front page offense report information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), is not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

section 552.101 in conjunction with section 550.065 of the Transportation Code. With the exception of basic information, the district attorney may withhold the remaining information from disclosure pursuant to section 552.108 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written over a horizontal line.

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 161898

Enc. Submitted documents

c: Mr. F. Clinton Broden  
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(w/o enclosures)